IN THE
SUPREME COURT OF MISSOURI

NO. SC86138

STATE OF MISSOURI, ex rel., TRANS WORLD AIRLINES, INC.,

Relator,

vs.

THE HONORABLE MICHAEL P. DAVID,
Judge of the Circuit Court of the City of St. Louis, Missouri
Division 1

Respondent.

BRIEF OF THE PLAINTIFF, BOBBIE MULLINS, ON BEHALF OF RESPONDENT, THE HONORABLE MICHAEL P. DAVID

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STATEMENT OF FACTS

Relator Trans World Airlines, Inc.'s (hereinafter "TWA") statement of facts contains arguments and legal conclusions. Therefore, Plaintiff, BOBBIE MULLINS, (hereinafter "Mullins") on behalf of Respondent, The Honorable Michael P. David, provides the following fair and concise statement of the facts relevant to the questions presented for determination pursuant to Rule 84.04(c).

Plaintiff filed her First Amended Petition on or about January 23, 2002 wherein she alleged, *inter alia*, that TWA, "currently keeps an office or agent for the transaction of its usual and customary business within the City of St. Louis." (Appendix to Relator's Brief (hereinafter "A"), A7-A11). At that time, both Defendant TWA and Defendant International Total Services, Inc. (hereinafter "ITS") were in bankruptcy proceedings and this cause was automatically stayed pursuant to the United States Bankruptcy Code. Therefore, no action was taken on this cause until June 30, 2003 when the trial court lifted the automatic stays and ordered both defendants to "answer, otherwise respond, or raise any applicable venue motions to Plaintiff's First Amended Petition on or before July 15, 2003." (A12).

Both TWA and ITS filed separate motions to transfer venue before the July 15, 2003 deadline. (A13-A25). TWA's venue motion, however, was supported with an affidavit that was signed but not notarized. (A18-A19). Mullins requested and the trial court granted her additional time to respond to both venue motions so that she could conduct discovery with respect to TWA's venue motion. (A26-A27). Mullins declined to conduct any discovery and the trial court heard the venue motions on December 8, 2003. (A48).

On March 9, 2004, the trial court issued an order denying the motions to transfer venue. (A49) The trial court ruled that TWA had not met its burden of proof and persuasion because the affidavit attached to its motion to transfer venue was not notarized. (A49-A53). TWA filed a motion to reconsider, and without leave of court, submitted an Affidavit of Michael J. Lichty that was notarized on March 18, 2004. (A54-A62). The trial court denied TWA's motion to reconsider for the same reasons set forth in its Order of March 9, 2004. (A63-A66). Moreover, the trial court ruled that TWA could not submit a notarized affidavit "over eight months after the July 15, 2003 deadline for venue motions had passed and three months after TWA submitted its Motion to Transfer for a ruling." (A66).

TWA's filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Eastern District, which was denied on June 29, 2004. (A69, A87).

In Relator's Brief, TWA argues that "Counsel for TWA did not realize a notarized copy of the affidavit had not been filed until the Court entered its Order denying its venue transfer motion on March 9, 2004." Relator's Brief, p. 22. Although not supported by the record, Plaintiff's Counsel submits that he raised the issue that TWA's affidavit in support of its motion to transfer venue was signed but not notarized during the hearing on TWA's motion to transfer venue on December 8, 2003, in the presence of The Honorable Michael P. David, TWA Attorney Todd C. Stanton and International Total Services, Inc.'s Attorney James Stockberger. Furthermore, at the same time, Plaintiff's counsel presented Judge David with the case authority, *Mueller v. Bauer*, 54 S.W.3d 652 (Mo.App. E.D. 2001), regarding the affidavit issue that was cited in the trial court's March 9, 2004 Order.

ARGUMENT

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE RELATOR HAS NOT SHOWN VENUE IS IMPROPER IN THE CITY OF ST. LOUIS PURSUANT TO RSMO 508.040.

A. Standard of Review

This Court has recognized that "Prohibition is a discretionary writ, and there is no right to have the writ issued." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-857 (2001) (citation omitted). "Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Id.*

B. Argument

TWA correctly posits that venue in Missouri is governed by statute and that Section 508.040 of RSMo applies to our facts. It is undisputed in this case that venue lies where the cause of action accrued or in any county where either TWA or ITS "shall have or usually keep an office or agent for the transaction of their usual and customary business." RSMo 508.040.

An allegation in the petition that venue is proper in a county "is sufficient to establish venue in the absence of a contrary showing." *Coale v. Grady Brothers Siding and Remodeling, Inc.*, 865 S.W.2d 887, 889 (Mo. App. 1993). Of course, the contrary showing usually presents itself in the form of a motion to transfer venue. Then, the party challenging venue "bears the burden of persuasion and proof, if proof is necessary, that venue is improper." *State ex rel. Etter v. Neill*, 70 S.W.3d 28, 31, (Mo. App. 2002). *Etter* further recognizes that

where the petition pleads venue, the party challenging venue must submit proof to meet its burden of persuasion and proof. *Id*. at 31-32. The question becomes what proof is necessary to meet a burden of persuasion and proof.

Missouri Rule of Civil Procedure 55.28 provides:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

As cited by the trial court, *Mueller v. Bauer, M.D.*, 54 S.W.3d 652, 657 (Mo. Ct. App. 2001) states that "[t]he truth of the facts contained in an affidavit must be sworn to in order for the affidavit to be proper." Certainly, a court may only consider testimony that is sworn to under oath when ruling on any motion.

Contrary to TWA's assertions at page 13 of Relator's Brief, it is disputed whether TWA maintains offices or agents in the City of St. Louis. TWA did not present any evidence in proper form to support its motion to transfer venue. There were no sworn to affidavits and there was no oral or deposition testimony. (A13-A19). At both the hearing on the motion to transfer venue and the motion for reconsideration, TWA could not and cannot point to any competent evidence to support its contention that venue is not proper in the City of St. Louis.

Throughout Relator's Brief, TWA cites the notarized Affidavit of Michael Lichty that was submitted, without leave of court, after the trial court denied TWA's motion to transfer venue. In its reconsideration order, the trial court effectively denied TWA the opportunity to file the notarized affidavit "over eight months after the July 15, 2003 deadline for venue

motions had passed and three months after TWA submitted its Motion to Transfer for a ruling." (A66). TWA cannot now rely on a document that it was denied leave to file.

TWA has failed to present any competent evidence to refute Mullins venue allegations within any time limits prescribed by the Missouri Supreme Court Rules, the Missouri Rules of Civil and the trial court. This Court should deny TWA's attempt to gain a second bite at the venue apple.

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE TWA DID NOT SATISFY ITS BURDEN OF DEMONSTRATING IMPROPER VENUE.

A. Standard of Review

This Court has recognized that "Prohibition is a discretionary writ, and there is no right to have the writ issued." *State ex rel. Linthicum*, 57 S.W.3d at 856-857 (citation omitted). "Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Id.*

B. Argument

TWA argues that it was not required to support its venue motion with a notarized affidavit because TWA alleges that Mullins never disputed that venue was improper in the City of St. Louis. Relator's Brief, p. 16. TWA again ignores Missouri law that states an allegation in the petition that venue is proper in a county "is sufficient to establish venue in the absence of a contrary showing." *Coale v. Grady Brothers Siding and Remodeling, Inc.*, 865 S.W.2d

887, 889 (Mo. App. 1993). From the time Mullins filed her Petition and First Amended Petition, she has maintained venue is proper in the City of St. Louis. (A1-A11).

Next, TWA argues that Respondent should have transferred this case to a proper venue because Mullins did not reply to the substantive allegations of TWA's venue motion. Relator's Brief, pp. 16-17. *State ex rel. Vee-Jay Contracting v. Neill*, 89 S.W.3d 470, 472 (Mo banc 2002) (emphasis added) states that "[a] judge must transfer venue if the opposing party does not reply to a **proper** motion to transfer." While citing *Vee-Jay Contracting* in Relator's Brief, TWA fails to recognize this duty is "purely ministerial" only when a judge is presented with a **proper** motion to transfer. Again, TWA did not present Respondent with a proper motion to transfer because its affidavit was not notarized.

Moreover, Mullins did file a reply to TWA's venue motion. (A28-A41). TWA, however, alleges that the Plaintiff failed to reply to its motion to transfer venue because her response did not specifically challenge TWA's unsupported allegations, and consequently, that pursuant to *State ex rel. Bierman v. Neill*, 90 S.W.3d 464 (Mo. banc 2002), TWA did not have to support its motion to transfer venue with a notarized affidavit. *Bierman*, however, is distinguishable.

First, there is no reference to whether the *Bierman* plaintiff plead venue in the petition like Mullins did herein. *Id.* Second, there is no issue in *Bierman* regarding affidavits that are not notarized. *Id.* And third, the plaintiff in *Bierman* expressly stated that certain sections of the applicable statute did not apply. *Id.* That scenario would be analogous to the Plaintiff herein expressly stating that venue does not lie in the City of St. Louis. Contrary to TWA's

arguments, the Plaintiff has never stated or conceded that venue is not proper in the City of St. Louis. Again, the Plaintiff pleaded venue in the City of St. Louis in her Petition and First Amended Petition and has not wavered from that position. (A1-A11).

TWA, citing Missouri Rule of Civil Procedure 55.09, also maintains that the allegations in its venue motion should be admitted because the Plaintiff did not deny them in her response. This rule is inapplicable for two reasons. First, 55.09 applies when " . . . a responsive pleading is required, . . ." Rule of Civil Procedure 51.045 states that an opposing party "*may*" file a reply to a motion to transfer venue; there is no required responsive pleading to a motion to transfer venue. (emphasis added).

Second, 55.09 applies to pleadings only, as opposed to motions. Generally, "Rule 55. Pleadings and Motions" sets forth different requirements for pleadings and motions. Rule 55.01 states that pleadings are petitions and answers. Black's Law Dictionary defines a pleading as "a formal document in which a party to a legal proceeding sets forth or responds to allegations, claims, denials or defenses. Black's Law Dictionary 1173 (7th ed. 1999). On the other hand, Rule 55.26 states that a motion is an application to the court for an order. Black's Law Dictionary defines a motion the same way, "A written or oral application requesting a court to make a specified ruling or order. Black's Law Dictionary 1031 (7th ed. 1999). Clearly, because a motion to transfer venue is a motion and not a pleading, 55.09 does not apply.

If 55.09 does apply, the allegations in TWA's venue motion are procedurally denied. Rule 55.09 provides "[s]pecific averments in a pleading to which no responsive pleading is

required shall be taken as denied." Rule 51.045 clearly sets forth that a reply to a motion to transfer venue is not required, "an opposing party **may** file a reply . . ." (emphasis added). Therefore, whether Mullins specifically denied the substantive allegations of TWA's venue motion is irrelevant because Rule 55.09 states they "shall be taken as denied."

Mullins' position finds further support in Rule of Civil Procedure 74.04 (Summary Judgment). That rule, unlike Rule 51.045, mandates that a response to a summary judgment motion "**shall** admit or deny each of movant's factual statements . . ." Rule 74.04(c)(2)(emphasis added). Moreover, Rule 74.04 mandates that if a response does not specifically admit or deny a factual allegation from the moving party's motion, that factual allegation is admitted. Rule 74.04(c)(2). Had the drafters of the Missouri Rules of Civil Procedure required responses to motions to transfer venue to specifically admit or deny factual allegations, the mandatory language found in the summary judgment rule (74.04) would have been included in the venue rule (51.045).

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING TWA AND ITS' MOTIONS TO RECONSIDER, BECAUSE THE TRIAL COURT PROPERLY REFUSED TO CONSIDER TWA'S SUPPLEMENTAL AFFIDAVIT.

A. Standard of Review

This Court has recognized that "Prohibition is a discretionary writ, and there is no right

to have the writ issued." *State ex rel. Linthicum*, 57 S.W.3d at 856-857 (citation omitted). "Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Id.*

B. Argument

TWA maintains that pursuant to Missouri Rule of Civil Procedure 55.33, the trial court had the discretion to permit TWA to file its notarized affidavit after the applicable deadlines and after the trial court had already issued its decision denying TWA's motion to transfer venue. Relator's Brief, p. 22. Again, Rule 55.33 is not applicable to the instant case because TWA's motion to transfer venue was a "motion" and not governed by 55.33 which contemplates amending and supplementing "pleadings." Even if the Court evaluates the trial court's decision by using the three criteria set forth in *Wheelehan v. Dueker*, 996 S.W.2d 780 (Mo. App. 1999), TWA has failed to show any abuse of the trial court's discretion.

1. TWA has no valid reason for failing to include a notarized affidavit with its motion to transfer venue.

Wheelehan's first criteria is to examine the reasons for the moving party's failure to include the matter in the original proceedings. *Id.* at 782. TWA's has put forth two reasons for failing to submit a notarized affidavit, neither of which amount to any legal reason for this Court to grant the relief requested. First, TWA alleges that a need to submit the motion and affidavit in a timely manner lead to the defective affidavit. Relator's Brief, p. 23. TWA has not provided any substantive argument as to why over two weeks, from June 30, 2003 to July 15, 2003, was not enough time to obtain a notarized affidavit. (A12). In fact, TWA served its

motion to transfer venue on Mullins on or about July 7, 2003, eight days before the deadline of July 15, 2003. (A13-A17). Certainly, TWA could have received a notarized affidavit within the remaining eight days in which it had to file its motion to transfer venue.

TWA also ignores that it had almost a year and a half to prepare it's motion to transfer venue. On or about January 11, 2002, TWA entered its appearance through counsel and filed a notice of bankruptcy and stay notification. (A32-A36). Even though the stay was in place, TWA's attorney set for hearing Mullins' motion to lift stay. (A40). In fact, when Mullins appeared before the trial court to have the stay lifted, TWA's attorney was in the courtroom. Moreover, the handwritten addition found at the end of the order lifting the stay was placed there at the insistence of the attorneys for TWA and ITS. (A12).

TWA had from January or February of 2002 to July 15, 2003 to prepare its venue motion and to obtain a notarized affidavit. Any argument about the need to file the venue motion and notarized affidavit in a timely manner is a red herring.

Second, TWA asserts that it did not realize its affidavit was not notarized until it received the trial court's March 9, 2004 Order denying the motion to transfer venue. Again, the defective affidavit issue was argued to the trial court by Mullins in the presence of TWA's attorneys on December 8, 2003. TWA had almost eight months from July 15, 2003 to March 9, 2004 to supply the trial court with a notarized affidavit and had three months from the hearing on December 8, 2003 until the trial court issued its ruling in March of 2004 to supply a notarized affidavit. Moreover, TWA's attorneys complied with Rule 55.03 and signed TWA's Motion to Transfer Venue. (A13-A19). Certainly, a party should be intimately familiar with

the contents of its motions and aware of the form of its attachments and affidavits.

2. Mullins would have suffered prejudice had the trial court accepted TWA's late filed affidavit.

TWA attempted to file its notarized affidavit well after the deadline for venue motions; well after it submitted its motion to transfer venue to the trial court on December 8, 2003; and after the trial court denied its motion to transfer venue on March 9, 2004. Mullins would be severely prejudiced by allowing TWA to skirt the Supreme Court Rules and obtain a second chance to defeat venue in the City of St. Louis. Mullins already had to undergo a costly and lengthy process of having the automatic stays lifted in the TWA and ITS federal bankruptcy proceedings. To force Mullins to now respond to an affidavit that was not timely filed would submit her to another delay in having her claim heard and adjudicated.

3. TWA has shown no substantial hardship.

TWA attempts to show substantial hardship with "anecdotal evidence" that jurors in the City of St. Louis are more disposed to injured plaintiffs than jurors in St. Louis County or elsewhere. Relator's Brief, p. 24. Certainly, there is no hardship when the same law is applied in the City of St. Louis as in St. Louis County and when the same defenses are available to TWA in the City of St. Louis as in St. Louis County. TWA had the opportunity to cure any "venue hardship" associated with the City of St. Louis when it filed its motion to transfer venue.

TWA has failed to show that the trial court's decision was "clearly erroneous." *Wheelehan*, 996 S.W.2d at 782.

CONCLUSION

For the reasons stated, Plaintiff Bobbie Mullins, on behalf of Respondent, The Honorable Michael P. David, requests that this Court deny Relator TWA's Petition for Writ of Prohibition and entering an order affirming the trial court's March 9, 2004 Order denying TWA's Motion to Transfer Venue.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed and served via U.S. Mail, this 10th Day of November, to following:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I, Kenneth P. Danzinger, attorney of record for Plaintiff Bobbie Mullins, certify pursuant to Supreme Court Rule 84.06(c) that:

1. This Brief contains the information required by Rule 55.03;

2. This Brief complies with the limitations contained in Supreme Court Rule 84.06(c) and Local Rule 360;

3. This brief complies with the limitations in Rule 84.06(b), in that it contains 3,450 words, excluding the cover page, signature block, Certificate of Service, and this certificate, according to the word count total contained in the WordPerfect 9 software with which it was prepared; and

4. The disk accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned, is virus free.

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